

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

NEW YORK STATEWIDE COALITION OF
HISPANIC CHAMBERS OF COMMERCE, THE
NEW YORK KOREAN-AMERICAN GROCERS
ASSOCIATION, SOFT DRINK AND BREWERY
WORKERS UNION, LOCAL 812,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, THE NATIONAL RESTAURANT
ASSOCIATION, THE NATIONAL
ASSOCIATION OF THEATRE OWNERS OF
NEW YORK STATE, and THE AMERICAN
BEVERAGE ASSOCIATION,

Plaintiffs-Petitioners-Respondents,

vs.

THE NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE, THE NEW
YORK CITY BOARD OF HEALTH, and DR.
THOMAS FARLEY, in his official capacity as
Commissioner of the New York Department of
Health and Mental Hygiene,

Defendants-Respondents-Appellants.

Index No. 653584/2012


**NOTICE OF MOTION
FOR LEAVE TO FILE
BRIEF AS *AMICI*
*CURIAE***

PLEASE TAKE NOTICE THAT, upon the annexed affirmation of
Alexandra A.E. Shapiro, dated April 25, 2013, and the materials attached thereto,
The Chamber of Commerce of the United States of America, National Black
Chamber of Commerce, National Federation of Independent Business, National
Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten
Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York

Association of Convenience Stores will move this Court at the Supreme Court Appellate Division, First Department, located at 27 Madison Avenue, New York, New York 10010, on the 6th day of May, 2013, at 10:00 am, or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to file a brief *amici curiae*.

Dated: April 25, 2013

Respectfully submitted,



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Index No. 653584/2012

**AFFIRMATION IN
SUPPORT OF MOTION
FOR LEAVE TO
APPEAR AS *AMICI*
*CURIAE***

ALEXANDRA A.E. SHAPIRO, an attorney duly licensed to practice law
before the courts of the State of New York, hereby affirms the following under
penalty of perjury.

1. I am a member in good standing of the Bar of the State of New York
and a partner with the law firm Shapiro, Arato & Isserles LLP. I represent the

proposed *amici curiae*, The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York Association of Convenience Stores (collectively, “*Amici*”) in this matter. This affirmation is made in support of *Amici*’s Motion for Leave to File Brief as *Amici Curiae* in support of Plaintiffs-Petitioners-Respondents.

2. The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of more than three million business and professional organizations of every size, in every industry, and from every region of the country. The U.S. Chamber’s members are central to the nation’s economy. The U.S. Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation’s business community. This case is of particular importance to the U.S. Chamber given the extraordinary nature of New York City’s proposed Portion Cap Rule on sugary drinks.

3. The National Black Chamber of Commerce (“NBCC”) is a nonprofit, nonpartisan and nonsectarian organization. It represents nearly 100,000 African-

American-owned businesses and indirectly represents an underlying membership of more than 2.1 million African-American-owned businesses nationwide. The NBCC has over 190 affiliated chapters located throughout the country.

4. The National Federation of Independent Business Small Business Legal Center (“NFIB Small Business Legal Center”), is a nonprofit public interest law firm and is the legal arm of the National Federation of Independent Business (“NFIB”). NFIB is the nation’s leading small business association, representing about 350,000 small businesses across the United States. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases like this one that will impact small businesses. The NFIB Small Business Legal Center advances the rights of small business owners to freely provide goods and services without unnecessary restrictions and defends the freedom of consumers to make reasonable lifestyle choices with respect to the products they consume.

5. The National Association of Manufacturers (the “NAM”) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase

understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

6. The Greater Harlem Chamber of Commerce (“GHCC”) originally incorporated in 1886 as the Harlem Board of Trade, is now in its third century of continued services to the Upper Manhattan area in general and the New York region in particular. The GHCC has served as an anchor of continued stability bridging the periods of urban neglect to the future of urban prosperity. The GHCC has in the past thirty years particularly focused on the renaissance and revitalization of upper Manhattan. Today, the mission of the GHCC is to improve the quality of life for all Harlem residents, as well as to develop and attract quality business and professional services.

7. The Staten Island Chamber of Commerce (“SCC”) has been serving the Staten Island since 1895. The SCC represents 800 members with 20,000 employees, and represents businesses on local, state, regional, national and international issues affecting life in Staten Island.

8. The Manhattan Chamber of Commerce (“MCC”) is a non-profit member organization, which serves as a primary resource and help for small and mid-size firms doing business in Manhattan. The MCC represents the voice of over 100,000 companies in Manhattan and partners with over 300 diverse business organizations. The MCC supports the business community by advocating for

positive business legislation, expanding marketing opportunities and international outreach. MCC's mission is to advocate for, connect and educate the business community in Manhattan. MCC is also focused on providing opportunities for women and minority business owners.

9. Founded in 1986, the New York Association of Convenience Stores ("NYACS") is a member-driven not-for-profit trade association that leads, safeguards, and forges a favorable environment for New York State's diverse, dynamic community of neighborhood convenience stores. NYACS provides return on membership investment by continuously delivering vital knowledge, a unified voice on legislative and regulatory issues, access to business solutions, and ways for members to share ideas, address common challenges, and build relationships. The NYACS membership consists of 180 companies that operate convenience stores, ranging in size from one store to over 300. Collectively, its retail members operate more than 1,500 store locations from Hamburg, Erie County to Hempstead, Long Island that serve nearly 1.3 million customers per day. Over half of NYACS's member retail companies are single-store operators. NYACS supports providing customers with nutritional information and allowing them to exercise their freedom to choose food and beverages.

10. The purpose of *Amici's* brief is to aid the court in understanding the effects New York City's proposed Portion Cap Rule on sugary drinks will have on

businesses in New York City and throughout the nation. *Amici* collectively represent the interests of millions of businesses and professional organizations throughout the country. *Amici*'s members are interested in promoting careful and intelligent approaches to anti-obesity regulation, which will provide meaningful redress to the obesity problem and do so in a cost-effective manner. The Portion Cap Rule is an example of an ill-considered and poorly designed approach to tackling a complex, national social problem. In enacting the Rule, the New York City Department of Health and Mental Hygiene and the Board of Health ("the Board") acted unlawfully by attempting to legislate in an area reserved for the New York City Council. Moreover, in doing so, they abandoned virtually every fundamental principle of responsible regulation. The Board failed to demonstrate that the means they chose, a cap on certain sugary-sweetened beverages, will successfully achieve its stated goal of reducing obesity, and the Board ignored evidence suggesting the Portion Cap Rule may in fact backfire. The Board did not meaningfully consider the substantial costs the Rule will impose on businesses, and ignored the troubling concerns related to the Rule's arbitrary and nonsensical system of loopholes. Due to New York City's prominence, the Rule's flaws are likely to affect business in other jurisdictions.

11. As *Amici* demonstrate, the Board ignored promising alternatives to the Portion Cap Rule. In particular, industry-led initiatives, including public-private

partnerships, have been used to combat numerous complex social problems, including health and wellness challenges. The Board's failure to consider these alternatives resulted in a missed opportunity to develop a collaborative and comprehensive approach to addressing obesity in New York City.

12. A copy of *Amici's* brief is attached hereto as Exhibit A.

WHEREFORE, on behalf The Chamber of Commerce of the United States of America, National Black Chamber of Commerce, National Federation of Independent Business, National Association of Manufacturers, Greater Harlem Chamber of Commerce, Staten Island Chamber of Commerce, Manhattan Chamber of Commerce, and New York Association of Convenience Stores, I respectfully request that the Court grant their motion to participate in this appeal as *Amici Curiae*.

Dated: April 25, 2013

Respectfully submitted,



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EXHIBIT A

New York Supreme Court

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ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE, and THE AMERICAN
BEVERAGE ASSOCIATION,

Plaintiffs-Petitioners-Respondents,

For a judgment pursuant to Articles 78 and 30
of the Civil Practice Law and Rules

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**AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, NATIONAL BLACK CHAMBER
OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT
BUSINESS, NATIONAL ASSOCIATION OF MANUFACTURERS,
GREATER HARLEM CHAMBER OF COMMERCE, STATEN ISLAND
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—against—

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of more than three million business and professional organizations of every size, in every industry, and from every region of the country. The Chamber’s members are central to the nation’s economy. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation’s business community. This case is of particular importance to the Chamber given the extraordinary nature of New York City’s proposed Portion Cap Rule on sugary drinks.

The National Black Chamber of Commerce (“NBCC”) is a nonprofit, nonpartisan and nonsectarian organization. It represents nearly 100,000 African-American-owned businesses and indirectly represents an underlying membership of more than 2.1 million African-American-owned businesses nationwide. The NBCC has over 190 affiliated chapters located throughout the country.

The National Federation of Independent Business Small Business Legal Center (“NFIB Small Business Legal Center”), is a nonprofit public interest law firm and is the legal arm of the National Federation of Independent Business (“NFIB”). NFIB is the nation’s leading small business association, representing about 350,000 small businesses across the United States. To fulfill its role as the

voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases like this one that will impact small businesses. The NFIB Small Business Legal Center advances the rights of small business owners to freely provide goods and services without unnecessary restrictions and defends the freedom of consumers to make reasonable lifestyle choices with respect to the products they consume.

The National Association of Manufacturers (the “NAM”) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Greater Harlem Chamber of Commerce (“GHCC”) originally incorporated in 1886 as the Harlem Board of Trade, is now in its third century of continued services to the Upper Manhattan area in general and the New York region in particular. The GHCC has served as an anchor of continued stability bridging the periods of urban neglect to the future of urban prosperity. The GHCC has in the past thirty years particularly focused on the renaissance and revitalization of upper Manhattan. Today, the mission of the GHCC is to improve

the quality of life for all Harlem residents, as well as to develop and attract quality business and professional services.

The Manhattan Chamber of Commerce (“MCC”) is a non-profit member organization, which serves as a primary resource and help for small and mid-size firms doing business in Manhattan. The MCC represents the voice of over 100,000 companies in Manhattan and partners with over 300 diverse business organizations. The MCC supports the business community by advocating for positive business legislation, expanding marketing opportunities and international outreach. MCC’s mission is to advocate for, connect and educate the business community in Manhattan. MCC is also focused on providing opportunities for women and minority business owners.

The Staten Island Chamber of Commerce (“SCC”) has been serving the Staten Island since 1895. The SCC represents 800 members with 20,000 employees, and represents businesses on local, state, regional, national and international issues affecting life in Staten Island.

Founded in 1986, the New York Association of Convenience Stores (“NYACS”) is a member-driven not-for-profit trade association that leads, safeguards, and forges a favorable environment for New York State's diverse, dynamic community of neighborhood convenience stores. NYACS provides return on membership investment by continuously delivering vital knowledge, a

unified voice on legislative and regulatory issues, access to business solutions, and ways for members to share ideas, address common challenges, and build relationships. The NYACS membership consists of 180 companies that operate convenience stores, ranging in size from one store to over 300. Collectively, its retail members operate more than 1,500 store locations from Hamburg, Erie County to Hempstead, Long Island that serve nearly 1.3 million customers per day. Over half of NYACS's member retail companies are single-store operators. NYACS supports providing customers with nutritional information and allowing them to exercise their freedom to choose food and beverages.

Amici collectively represent the interest of millions of businesses and professional organizations throughout the country. New York City's remarkable ban on the sale of certain sugar-sweetened beverages ("SSBs") sold by some outlets (referred to by the Supreme Court as the "Portion Cap Rule" or the "Rule," or by Plaintiffs-Respondents as the "Ban") raises important issues for *Amici* and their members, who are interested in promoting careful, intelligent, and market-based approaches to complex, national social problems. In sharp contrast, the Portion Cap Rule is a reckless, ill-conceived, top-down regulation that has little chance of meaningfully affecting the Board's purported health objectives. Although national health and wellness trends are particularly significant to *Amici* because of their impact on the costs of health care, which are often borne by

employers, the Rule does nothing to address these issues. Further, *Amici* are independently motivated to respond to the demands of the marketplace and are responsive to consumer concerns about health. But the Rule overlooks private-sector responses aimed at addressing complex national health issues.

In addition to the profound costs the Portion Cap Rule imposes on *Amici*'s business members operating in New York City, the Rule has implications and public policy consequences that extend far beyond New York. New York City's economy ranks among the top 15 in the world, higher than India, Mexico, and South Korea,¹ and therefore its regulations have economic effects well beyond its borders. Moreover, because of the City's size and prominence, officials from across the country look to New York City as a kind of regulatory leader, and often copy New York City's regulatory solutions in their own jurisdictions.² Thus, since the Rule was proposed in 2012, officials in cities across the country – including Philadelphia, Washington D.C., and Cambridge, Massachusetts – have expressed interest in enacting a similar ban,³ and other jurisdictions may follow suit if the

¹ Richard Florida, *The 25 Most Economically Powerful Cities in the World*, *The Atlantic Cities* (Sep. 15, 2011), <http://www.theatlanticcities.com/jobs-and-economy/2011/09/25-most-economically-powerful-cities-world/109/#slide2>.

² For instance, Mayor Bloomberg credits New York City's adoption of the policy banning smoking in bars and restaurants as the inspiration for hundreds of jurisdictions to follow suit. *See* Jennifer Peltz, *NYC smoking ban turns 10*, *MyFoxNY.com* (Apr. 10, 2013, 11:53 AM), <http://www.myfoxny.com/story/21807334/nyc-smoking-ban-turns-10>.

³ *See, e.g.,* Jennifer Mattson, *Los Angeles considers ban on large sodas at parks and libraries*, *Global Post* (June 20, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/united->

Portion Cap Rule is upheld. Conversely, given New York City's prominence on the national stage, its regulatory solutions can inspire a backlash in other jurisdictions. For example, in response to the Portion Cap Rule, Mississippi has proposed an "anti-Bloomberg" law that prohibits local governments from regulating food and drinks in restaurants.⁴

An inconsistent patchwork of state and municipal regulations can create a balkanized economy and disrupt finely tuned distribution chains. Businesses may be barred from selling certain SSBs in half of a state and be free to sell all SSBs in the other half. These disruptions will prove costly to businesses and consumers. In any event, given the unavoidable regulatory ripple effect, it is imperative that New York City's approach to the obesity problem is responsible and responsive. Unfortunately, the Portion Cap Rule is the poster child for ill-considered, poorly designed, expensive, intrusive, and ineffective regulation.

states/120620/los-angeles-considers-ban-large-sodas-at-parks-a#1; Emily Leaman, *Mayor Nutter Hearts Bloomberg's Big-Soda Ban*, Philadelphia Magazine (June 8, 2012), <http://blogs.phillymag.com/bewellphilly/2012/06/08/mayor-nutter-hearts-bloombergs-soda-ban/>; *D.C. councilmembers still support super-sized soda ban*, ABC7 News (Mar. 12, 2013), <http://www.wjla.com/articles/2013/03/d-c-councilmembers-still-support-super-sized-soda-ban-86150.html>; *Big soda ban proposed by mayor of Cambridge, Mass.*, CBS News (June 19, 2012), http://www.cbsnews.com/8301-504763_162-57456252-10391704/big-soda-ban-proposed-by-mayor-of-cambridge-mass/.

⁴ See Kristen A. Lee, *Mississippi's so-called anti-Bloomberg bill signed into law*, NY Daily News, Mar. 21, 2013, available at <http://www.nydailynews.com/news/politics/mississippi-anti-bloomberg-bill-signed-law-article-1.1294848>.

PRELIMINARY STATEMENT

In enacting the Portion Cap Rule, the New York City Department of Health and Mental Hygiene and the Board of Health (collectively, “the Board”) exceeded the scope of their authority by attempting to legislate in an area reserved for the New York City Council, as Plaintiffs-Respondents explain. In doing so, the Board not only acted *unlawfully, but also* abandoned virtually every fundamental principle of responsible regulation. There is no evidence or reason to believe that the Rule’s fix – a cap on certain SSBs – will achieve its stated objective of reducing obesity. And it may well make the obesity problem worse. Equally troubling, the Board failed to adequately consider the substantial costs that the Rule will impose on businesses, or to adequately weigh those costs against the purported benefits of the Rule. The Rule is also littered with arbitrary exceptions and loopholes that further undermine its stated objectives, and are unfair to the businesses that remain subject to its onerous terms. These flaws stem, in part, from the fact that the Board has attempted to usurp the City Council’s power and regulate in an unprecedented manner well beyond its regulatory authority, and did so without meaningfully considering the views of affected businesses and consumers. The Rule is a particularly disturbing example of how government can do more harm than good when it ignores fundamental principles of responsible regulation.

Additionally, in reflexively adopting the Portion Cap Rule, the Board turned a blind eye to alternative approaches that had the potential to more effectively and fairly address national health and wellness challenges. In particular, the Board failed to consider the many examples of existing industry-led initiatives to improve individual wellness. And it failed to engage directly with industry to capitalize on those efforts to develop a collaborative, comprehensive response to the problem in the form of a public-private partnership.

For all of these reasons, *Amici* submit this brief in support of the judgment below.

ARGUMENT

I. In Addition To Being Impermissibly Legislative In Nature, The Portion Cap Rule Violates Core Principles Of Responsible Regulation

As the Supreme Court correctly held, in enacting the Portion Cap Rule, the Board unlawfully exceeded the scope of its authority and impermissibly acted in a legislative capacity. R.40–41; *see also* Plaintiffs-Respondents’ Brief at 15-50.

The Rule is not only unlawful, but also would not be responsible regulation.

When an agency seeks to use regulation to address a complex social issue, such as obesity, it should do so carefully, abiding by fundamental principles of responsible regulation. *First*, a regulation should be based on a strong, well-established connection between the problem to be remedied and the means chosen to address the problem. *Second*, when acting within their authority to implement

law and policy created by the legislature, regulators must carefully consider the costs of regulatory proposals, including the potential for unanticipated costs, and weigh them against the benefits of proposed regulations.⁵ *Third*, regulations should be fairly designed and implemented. In practice, this means that regulations should not irrationally discriminate among businesses or burden them more than is necessary to achieve the objective.⁶ *Fourth*, by operating within the zone of their well-established authority, agencies maximize their expertise, while limiting the potential of regulatory overreach. *Fifth*, the regulatory process should be inclusive and transparent, based on and responsive to input from the regulated community.⁷ The Rule violates each and every one of these common-sense principles.

⁵ See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1493 (2002) (“Cost-benefit analysis is . . . an effort . . . to increase the likelihood that regulation will actually produce human goods.”). The centrality of cost-benefit analysis to agency decision-making is well-established for federal regulations. See, e.g., Exec. Order No. 12,866, 3 C.F.R. 639 (1994); Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

⁶ Organisation for Economic Co-operation and Development, *OECD Guiding Principles For Regulatory Quality and Performance* 5, available at, <http://www.oecd.org/fr/reformereg/34976533.pdf>.

⁷ Eric J. Pan, *Structural Reform of Financial Regulation*, 19 Transnat’l L. & Contemp. Probs. 796, 811–12 (2011) (discussing the importance of transparency and freedom from political interference to regulatory systems); see also Organisation for Economic Co-operation and Development, *supra* at 5

A. The Rule's Prohibitions Are Not Sufficiently Connected To Its Stated Objective

The Portion Cap Rule⁸ is an irrational response to the complex societal problem of obesity. The Board failed to establish a reasonable basis for its conclusion that sugary drink consumption is a primary driver of the growth in obesity rates. Nor did the Board establish that banning the sale of sugary drinks in containers larger than 16 ounces will reduce obesity rates in New York City.

The Rule regulates one perceived aspect (consumption of sugary drinks) in a long, multi-factor chain of potentially contributing causes. As Plaintiffs-Respondents note, the Board failed to address numerous studies that cast doubt on the causal linkage between consumption of large-portioned SSBs and obesity.⁹ The Board also failed to reasonably demonstrate that the intrusive ban would successfully address any of the other myriad causes of obesity, including consumption of calories from other sources, which far exceed consumption from SSBs.¹⁰ Without addressing these sources, the Rule has little chance of success.

⁸ The Rule prohibits certain covered food service establishments ("FSEs") from selling "sugary drinks" in containers larger than 16 fluid ounces and from selling self-service cups, for any beverage, larger than 16 fluid ounces. N.Y.C.R.R. tit. 24, § 81.53(b)–(c). "Sugary drinks" are defined as beverages that are sweetened by a manufacturer or establishment with sugar or a caloric sweetener and that contain greater than 25 calories per eight fluid ounces. § 81.53 (a)(1).

⁹ Plaintiffs-Respondents' Br. 13. *See also* R. 372–73 (listing several studies that found no significant link between SSBs and weight gain in children and adolescents); R. 346, 349.

¹⁰ *See* U.S. Dep't of Agriculture & U.S. Dep't of Health and Human Services, *Report of the Dietary Guidelines Advisory Committee on the Dietary Guidelines for Americans, 2010* D1-3 (May 2010), available at <http://www.cnpp.usda.gov/dgas2010-dgacreport.htm>.

The Board also failed to confront evidence that the Rule might, in fact, *exacerbate* the problem by increasing overall calorie consumption. Indeed, the primary study the Board cited for the proposition that portion sizes and obesity rates are positively correlated is a Cornell University study¹¹ whose author, Dr. Brian Wansink, has since publicly explained that the study's conclusions do not support the Portion Cap Rule and that the Portion Cap Rule "will be an epic failure."¹² The Board also ignored other studies that have shown that prohibitions similar to the Portion Cap Rule provoke "rebellion" among participants in various ways.¹³ Most significantly, in such studies, participants who were forced to consume low-fat or low-calorie meals often chose to consume higher-calorie foods at later meals in response, leading to an overall increase in calorie consumption.¹⁴ Accordingly, the Board has not adequately demonstrated that the premise on which

¹¹ See R. 132–133.

¹² See Brian Wansink & David Just, *How Bloomberg's Soft Drink Portion Cap Rule Will Backfire on NYC Public Health*, The Atlantic, June 14, 2012, available at <http://www.theatlantic.com/health/archive/2012/06/how-bloombergs-soft-drink-ban-will-backfire-on-nyc-public-health/258501/>; See Anemona Hartocollis, *To Gulp or to Sip? Debating a Crackdown on Big Sugary Drinks*, N.Y. Times, May 31, 2012, available at <http://www.nytimes.com/2012/06/01/nyregion/to-gulp-or-to-sip-debating-a-crackdown-on-big-sugary-drinks.html?pagewanted=all>.

¹³ Wansink & Just, *supra*.

¹⁴ *Id.* See also Sarah Kliff, *Will New York City's large soda Portion Cap Rule backfire?*, Wash. Post, Apr. 14, 2013, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/14/will-new-york-citys-large-soda-ban-backfire/>

the Rule is based – that banning sugary drinks above a certain size will lower obesity rates – is reasonable.

B. The Board Failed To Engage In A Meaningful Cost-Benefit Analysis In Its Proper Agency Role

The Board attempted to support the Portion Cap Rule on the ground that its purported benefits outweighed its costs. As Plaintiff-Respondents explain, to the extent that the Board conducted any cost-benefit analysis, it did so in the absence of any legislative direction from the City Council and acted *ultra vires*. But even where an agency is acting in its proper administrative role and is implementing law and policy pursuant to delegated authority, an agency still must meaningfully consider the substantial costs that various regulatory approaches would impose on businesses and consumers. Here, the Board utterly failed to do that. This shortcoming is particularly egregious in light of the speculative benefits of the Portion Cap Rule. Indeed, the Board made no findings as to the costs of compliance. Instead, it blithely asserted that though “there may be some associated costs” with adjusting to the Portion Cap Rule, “the potential health benefits [of the Portion Cap Rule] outweigh these costs.” R. 450.

In fact, FSEs, beverage manufacturers, and beverage distributors all face substantial costs in adjusting their supply chains and product offerings to comply with the Portion Cap Rule. Businesses will be forced to change menus, glasses, bottles, cans, bottle and can molds, bottling machines, packaging labels,

advertisements, vending machines and countless other related aspects of their supply chains to comply.¹⁵ These costs may range from the hundreds of thousands to millions of dollars per business.¹⁶ In order to abide by the Portion Cap Rule, these manufacturers and distributors will now have to either create duplicative supply chains just for New York City or bring their nationwide supply chains into compliance with the Portion Cap Rule.¹⁷

Moreover, the selected portion cap of 16 ounces is especially burdensome to beverage manufacturers and distributors, as many beverages are sold in 500 milliliters (or 16.9 ounces) and 20 ounce cans and bottles.¹⁸ The Board provided no meaningful justification for this cutoff, instead summarily stating that it “balances health impact and feasibility for FSEs.” But without actual findings

¹⁵ See R. 658–60 (outlining the vast number of processes that bottlers, distributors, and restaurants must alter under the Portion Cap Rule).

¹⁶ See, e.g., Seth Goldman, *Mayor Bloomberg and Our 16.9-Ounce Tea*, Wall St. J., July 22, 2012, available at <http://online.wsj.com/article/SB10000872396390444873204577537303844223474.html>; R. 1696.

¹⁷ The sheer complexity of the rules will create substantial confusion, exacting further costs, as many businesses will be forced to ascertain what percentage of their revenue comes from ready-made food, what percentage of milk certain beverages contain, and precisely how many lumps of sugar may be added to a beverage before it breaches the calorie threshold. See, e.g., Vivian Yee & Michael M. Grynbaum, *City’s New Drink Rules Add Wrinkle to Coffee Orders*, N.Y. Times, Mar. 6, 2013, available at http://www.nytimes.com/2013/03/07/nyregion/new-sugary-drink-rules-complicate-coffee-orders.html?ref=todayspaper&_r=0 (detailing the confusion among coffee shops about the new rules, and noting that some intend to hand out fliers at cash registers to explain the rules to perplexed consumers).

¹⁸ See Goldman, *supra*.

about the reasons for and costs of the 16-ounce cutoff, the Board had no reasonable basis to draw this arbitrary line.

In short, the business community is set to incur tens of millions of dollars in direct costs as a result of the Portion Cap Rule simply because a government board rushed to the uninformed and erroneous judgment that the Portion Cap Rule's benefits would outweigh its costs.

C. The Rule Draws Arbitrary Lines And Creates Nonsensical Loopholes That Undercut The Objective Of The Rule And Are Unfair To Businesses

As the lower court recognized, the Portion Cap Rule is littered with arbitrary lines and loopholes. R. 40. These arbitrary exceptions serve to discriminate against certain businesses and to undermine the justification for placing these burdens on businesses and consumers.

First, the Rule carves out from the definition of sugary drinks a plethora of beverages, including all alcoholic beverages and beverages that contain more than 50% of milk or a soy-based milk substitute. § 81.53(a)(1). The Rule also covers only some FSEs—such as street carts, restaurants, and movie theaters—while excluding other FSEs that derive less than 50% of their revenue from food prepared in individual portions—such as supermarkets, certain bodegas, pharmacies, and gas stations. R. 452. Moreover, the Ban does nothing to affect various other activities or offerings, including selling sugary drinks in bundles,

offering free refills, and offering self-serve sugar, which result in the consumption of just as many, if not more, calories.

These exceptions obliterate any purported effect that the Board claims the Rule would have. Consumers are free to purchase as many ounces as they wish of alcoholic beverages, milkshakes, or even sugary drinks from certain favored FSEs. Consumers can still get free refills or purchase sugary drinks in bundles. The Board claims it had no authority to regulate alcohol or the FSEs it exempted from the Rule, but even were that true, it would simply indicate that governing calorie consumption is too complex for one administrative agency to attempt to regulate on its own.

Equally troubling, the exceptions for certain beverages and FSEs will arbitrarily favor some businesses and punish others. For example, a food cart is barred from selling a 20-ounce soft drink, while a convenience store on the same block is not. An iced tea manufacturer will be barred from selling a 500 milliliter iced tea, while another business can sell a 30-ounce blended coffee and milk drink or a 24-ounce beer can.

The Board gave lip service to these concerns, asserting – without any evidence or serious analysis – that any feared market distortions were “unlikely” and “improbable.” R. 450. Moreover, it did not base these distinctions on reasons related to obesity reduction. The Portion Cap Rule thus arbitrarily picks winners

and losers, placing some businesses at a competitive disadvantage while leaving others unaffected. Indeed, as the Supreme Court correctly concluded, these arbitrary classifications render the Rule arbitrary and capricious and, therefore, invalid. R. 40.

D. Many Of The Flaws In The Portion Cap Rule Are Due To The Fact That The Board Was Acting *Ultra Vires*

The flaws of the Portion Cap Rule – including its arbitrary line-drawing – are in part due to the failure of the Board to stay within its traditional area of authority and expertise. In particular, as noted above, the Board exceeded the bounds of its authority by attempting to regulate in an area reserved for the legislature. As Petitioners convincingly explain, in enacting the Rule, these agencies usurped legislative authority that they did not possess or have the expertise to wield. *See* Plaintiffs-Respondents’ Br. at 35–48.

In addition, they chose to act despite their belief that they lacked the authority to regulate in a non-arbitrary way. These agencies now claim that the Rule’s arbitrary exemptions for alcoholic beverages and certain FSEs are necessary because jurisdiction over alcohol and those exempt FSEs is vested the State Liquor Authority and the State Department of Agriculture and Markets respectively. But rather than excusing the arbitrariness of the Portion Cap Rule, this jurisdictional morass indicates that the Board overreached in “going it alone.” If these agencies were precluded from enacting a non-arbitrary portion cap regulation, that is simply

evidence they should have refrained from enacting any portion cap regulation on their own.

E. The Rule Was Not The Product Of Open And Transparent Rulemaking

The Rule is the result of a process that utterly failed to consider the concerns of affected businesses and consumers. Although the Board solicited public comments, it ignored scientific studies that contradicted its assumptions, disregarded concerns about its arbitrary line-drawing, and blindly assumed without any meaningful consideration that the benefits of the Rules would outweigh the costs. Indeed, despite over 38,000 comments to the proposed rule and over 90,000 signatures opposing it, the Rule remains materially identical to the proposal first designed by Mayor Bloomberg.

* * *

Although the Board's desire to find a quick fix for national health issues is understandable, there is a right way to tackle complex problems and a wrong way to do so. The Portion Cap Rule is the epitome of the latter.

II. The Board Failed To Consider Industry-led Solutions And Public-Private Partnerships As Alternatives To Regulation

In addition to violating the most fundamental principles of responsible regulation, the Board's top-down ban on sugary beverages failed both to recognize existing private sector responses to the obesity problem and to solicit the

participation and views of industry in order to devise a collaborative strategy for combating obesity. Industry-led solutions, including public-private partnerships, present a promising alternative to unilateral, coercive regulation of complex social issues.

A. Public-Private Partnerships Present A Promising Alternative To Regulation

When regulators confront complex social issues, they frequently look to regulate their way to a solution. Though regulation can play a role, private-based initiatives present a promising alternative to regulation – especially to poorly crafted regulations like the Portion Cap Rule.

Public-private partnerships leverage the diversity, reach, and flexibility of businesses to provide innovative solutions to complex, multifaceted problems.¹⁹ These partnerships allow public entities to take advantage of that flexibility, allowing for experimentation in ways that are less likely to be achieved through regulation.²⁰ Coercive regulations often come with the opportunity cost of crowding out private innovation. Businesses subject to the regulations may be blocked from innovating their own solutions in response to market demands.²¹

¹⁹ Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 Ind. Health L. Rev. 139, 148 (2006).

²⁰ *Id.*

²¹ See Henderson, *Voice and Exit in Health Care Policy*, Regulation 28, 31 (Spring 2013), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/3/v36n1-9.pdf>.

Through partnerships, governments can benefit from business' greater opportunity for innovation and experimentation.

Public-private partnerships in some instances provide a framework for collaborative information sharing between the private sector and government, and among the business community. In many instances, businesses that must respond to the market demands of their consumers and customers have both the information and incentive to efficiently monitor and adjust programs that are intended to respond to particular problems.²²

Moreover, some public problems are too large to be handled by state and local governments alone.²³ For example, addressing national obesity trends may ultimately require an integrated, comprehensive solution, with governments working hand-in-hand with employers and businesses to create the right mix of incentives and options to promote a healthy lifestyle.

Such partnerships have been used to address a host of complex public policy issues, including, for example, combating counterfeiting,²⁴ promoting

²² Michael L. Marlow & Alden F. Shiers, *Optimal Weight*, Regulation 10, 14 (Summer 2011), available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2011/8/regv34n2-3.pdf>; Trubek, *supra* at 148–49; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Substitutes for Regulation*, 111 Mich. L. Rev. 197, 198–99 (2012).

²³ See Grainne de Burca, *New Governance and Experimentalism: An Introduction*, 2010 Wis. L. Rev. 227, 232 (2010).

²⁴ *U.S. Chamber Applauds Public-Private Partnership in Defeating Counterfeiting Ring*, U.S. Chamber of Commerce, <http://www.uschamber.com/node/5413/%252Fmarch>.

cybersecurity,²⁵ improving infrastructure,²⁶ facilitating disaster recovery,²⁷ fostering international development,²⁸ and improving the environment.²⁹

New York City is no stranger to public-private partnerships. For example, working together with city agencies, businesses have helped to protect and preserve much of the City's parkland through partnerships such as the Central Park Conservancy, Friends of the Highline, Open Space Alliance of North Brooklyn, and the Prospect Park Alliance.³⁰ CitiBike, a privately-funded bikesharing program, is now providing New Yorkers a convenient, healthy option for

²⁵ See U.S. Chamber of Commerce, *Improving Our Nation's Cybersecurity Through the Public-Private Partnership* (Mar. 8, 2011), available at <http://www.uschamber.com/sites/default/files/issues/defense/files/2011cybersecuritywhitepaper.pdf>.

²⁶ See Eric Boyer, Rich Cooper, & Janet Kavinsky, *Public-Private Partnerships and Infrastructure Resilience*, National Chamber Foundation, <http://forum.uschamber.com/sites/default/files/PPPs%20and%20Infrastructure%20-%20NCF.pdf>.

²⁷ Kathy Snyder, *et al.*, *Maryland Businesses Get Their Stake in Emergency Response*, The Role of Business in Disaster Response, at 14–15, available at <http://bclc.uschamber.com/sites/default/files/documents/files/Role%20of%20Business%20in%20Disaster%20Response.pdf>; Mark Cooper, *Public-Private Collaboration: Six Years After Hurricane Katrina*, The Role of Business in Disaster Response, at 16–17, available at <http://bclc.uschamber.com/sites/default/files/documents/files/Role%20of%20Business%20in%20Disaster%20Response.pdf>.

²⁸ *Global Development*, U.S. Chamber Business Civic Leadership Center, <http://bclc.uschamber.com/program/global-development>.

²⁹ *Environmental Innovation*, U.S. Chamber Business Civic Leadership Center, <http://bclc.uschamber.com/program/environmental-innovation>.

³⁰ See Bridget Moriarty, *Adrian Benepe and the Legacy of Public-Private Partnerships in NYC*, Next City (July 3, 2012), <http://nextcity.org/daily/entry/adrian-benepe-and-the-legacy-of-public-private-partnerships-in-nyc>.

transportation.³¹ The Center for Active Design, another public-private partnership, will research and implement active design strategies for New York’s buildings and communities.³²

B. Private Initiatives And Public-Private Partnerships Have Been A Valuable Tool In Addressing Obesity

Private-sector initiatives and public-private partnerships have proliferated in the public health context,³³ and in particular, in the campaign to promote individual wellness and nutrition and to combat obesity. Indeed, the list of public-private partnerships in the health and wellness arena is long,³⁴ and makes the Board’s failure to engage the business community on this issue, and decision instead to proceed with a misguided and deeply flawed approach to obesity, particularly disappointing.

³¹ See Citi Bike, *About Citi Bike*, <http://citibikenyc.com/about>.

³² See Center for Active Design, *About*, <http://centerforactivedesign.org/about/>.

³³ See Nan D. Hunter, ‘Public-Private’ Health Law: *Multiple Directions in Public Health*, 10 J. Health Care L. & Pol. 89, 103–05 (2007). See also U.S. Chamber of Commerce, Comments to Proposed Rule on Incentives for nondiscriminatory Wellness Programs in Group Health Plans, Jan. 25, 2013, *available at* <http://www.uschamber.com/sites/default/files/comments/Workplace%20Wellness%20Programs%20Proposed%20Rule%20-%20US%20Chamber%20of%20Commerce%20Comments.pdf> (“With health care costs continuing to rise and rates of obesity and other chronic diseases and conditions on the rise, wellness programs have provided a meaningful mechanism to reward positive behavior and healthy life-style choices”).

³⁴ See Association of State and Territorial Health Officials, *Childhood Obesity: Harnessing the Power of Public and Private Partnerships* 1–2 (2007), *available at* http://www.nihcm.org/pdf/FINAL_report_CDC_CO.pdf (collecting numerous case studies of public-private partnerships addressing childhood obesity).

One of the most prominent partnerships is the Partnership for a Healthier America, through which many of *Amici*'s members work in conjunction with the federal government's successful Let's Move! campaign to develop strategies to end childhood obesity. Indeed First Lady Michelle Obama has publicly praised corporate participation in the joint venture: "Every day, great American companies are achieving greater and greater success by creating and selling healthy products. In doing so, they are showing that what's good for kids and good for family budgets can also be good for business."³⁵

In addition to private-public partnerships in this area, many businesses are collaborating to promote private-led innovative responses to the obesity trends. For example, the U.S. Chamber's Business Civic Leadership Council has created a "Nutrition and Obesity Network" that "provides companies and stakeholders a high level of coordination, connections, and relevant information in order to tackle this challenging [obesity] problem." The food and beverage industry, in particular, has demonstrated a commitment to voluntarily fighting obesity, often in conjunction with government entities and other non-profit organizations. Indeed, leading beverage manufacturers who are members of the American Beverage

³⁵ Michelle Obama, *The Business Case for Healthier Food Options*, Wall St. J., Feb. 27, 2013, available at <http://online.wsj.com/article/SB10001424127887323884304578328682206937380.html>; Rebecca Friendly & Araceli Ruano, *Public-Private Partnership in California Tackles Obesity, Hunger Epidemics*, ThinkProgress (Feb. 1, 2012), <http://thinkprogress.org/health/2012/02/14/425453/california-obesity-freshworks/?mobile=nc>.

Association (“ABA”) market and sell a full range of beverage offerings, including sugar-sweetened, diet and zero calorie soft drinks, bottled water (still water, mineral water, and artesian water), sports drinks, energy drinks, 100% juices, juice drinks, and ready-to-drink teas. These products are sold in an assortment of sizes with clear labels that provide nutrition and calorie information so that consumers can make informed choices concerning the beverages that best suit their needs and preferences.³⁶ As a result, the average calorie amount per beverage serving has dropped approximately 23% between 1998 and 2010.³⁷

The beverage industry focuses on increasing consumer awareness of nutritional information and empowering consumers to make healthy choices for themselves. In February 2010, major beverage manufacturers and distributors, through the ABA, voluntarily launched the “Clear on Calories” program, under which every can, bottle, pack, and company-controlled vending or fountain machine now includes an additional and more prominent nutritional label displaying the calorie count of each beverage.³⁸ The uniform and readily noticeable label was designed after significant consumer research and coordination

³⁶ R. 56, 265–66.

³⁷ See American Beverage Association, *Beverage Industry Responds to Latest Rudd Report* (Oct. 31, 2011), <http://www.ameribev.org/news--media/news-releases--statements/more/253/>; see also R. 344 (finding a 20% decrease between 2001 and 2010).

³⁸ See American Beverage Association, *New Calorie Labels on Front of Beverages Arrive in Stores* (Feb. 8, 2011), <http://www.ameribev.org/nutrition--science/clear-on-calories/news-releases/more/235/>.

with the Food and Drug Administration, with the objective of providing easy-to-understand nutritional information to consumers. The food and beverage industry, through the Grocery Manufacturers Association and the Food Marketing Institute, implemented a similar plan, called the “Nutrition Keys” initiative, which commits member companies to a front-of-the pack label displaying calorie, saturated fat, sodium, and sugar amounts per serving.³⁹

Similarly, the ABA recently unveiled the “Calories Count™ Vending Program” in Chicago and San Antonio. This program increases the availability of lower-calorie beverages in many vending machines and ensures that those machines prominently display the calorie amounts for each beverage choice.⁴⁰ Under the program, all vending machines in city buildings or controlled by an ABA member will contain a prominent label on the front of the machine with the words “Calories Count. Check then Choose” or “Try a Low-Calorie Beverage,”

³⁹ See Grocery Manufacturers Association, *Nutrition Keys Front-of-Package Nutrition Labeling Initiative Fact sheet*, http://www.gmaonline.org/file-manager/Health_Nutrition/nutritionkeys-factsheet.pdf.

⁴⁰ See American Beverage Association, *America’s Beverage Companies Are Delivering for the Cities of Chicago and San Antonio*, http://www.ameribev.org/files/343_final%20vending%20backgrounder%20with%20label.pdf. Although this program, as of now, has been rolled out only in San Antonio and Chicago, the ABA is working with mayors throughout the country and anticipate expanding the program to various cities nationwide and to all vending machines in public spaces. *Id.*

encouraging consumption of lower-calorie drinks.⁴¹ In addition, the American Beverage Foundation for a Healthy America gave a five million dollar grant to the two cities to fund an “employee wellness challenge” to increase participation among city employees and family members in various wellness programs.⁴²

In addition, the beverage industry has promoted a comprehensive approach to obesity prevention and reduction, implementing programs, among others, to increase physical fitness in schools and local communities,⁴³ creating “Healthy Living Hubs” to bring fresh fruits and vegetables into communities considered

⁴¹ See American Beverage Association, *Calories Count: America’s Beverage Companies Launch New Vending Program* (Oct. 8, 2012), available at <http://www.deliveringchoices.org/?p=547>

⁴² City of Chicago, *Mayor Emanuel, San Antonio Mayor Julian Castro and the American Beverage Foundation for a Healthy American Launch New Municipal Wellness Competition* (October 8, 2012), http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2012/october_2012/mayor_emanuel_sanantoniomayorjuliancastroandtheamericanbeveragef.html.

⁴³ See *Coca-Cola Announces Its Steps to Nationally Address Obesity*, Chicago Defender, Jan. 13, 2013, at 15; American Beverage Association, *We’re Delivering Mississippi* (Apr. 19, 2012), available at <http://www.deliveringchoices.org/?p=419> (describing an initiative of the American Beverage Foundation for a Healthy America which provided a grant to increase physical fitness among Mississippi government employees and citizens).

food deserts,⁴⁴ and partnering with the U.S. Conference of Mayors to reward cities promoting a balanced diet and physical activity.⁴⁵

The beverage industry has been particularly proactive in combating childhood obesity, focusing on schools because they represent a unique environment where parents are not present to supervise what their children eat and drink. In 2006, the ABA, in cooperation with a joint initiative of the William J. Clinton Foundation and the American Heart Association, voluntarily adopted the National School Beverage Guidelines to advance nutrition in schools. Pursuant to the Guidelines, ABA members have removed full-calorie soft drinks from all schools, and now offer only 100% juice, milk, and bottled water in elementary and middle schools.⁴⁶ In high schools, no beverage with more than 66 calories per eight fluid ounces may be sold and at least 50% of non-milk beverages sold must be water or no-calorie or low-calorie beverages.⁴⁷ These Guidelines have proven incredibly successful, resulting in a *95% reduction* in shipments of full-calorie soft

⁴⁴ See Bart Mills, *Soda Companies Chip in on Lima's Health Program*, The Lima News, Feb. 15, 2012, available at http://www.limaohio.com/news/local_news/article_9b33fed1-5e10-5179-bb89-3725c0231623.html.

⁴⁵ See American Beverage Association, *America's Beverage Companies Team Up With U.S. Conference of Mayors to Announce Childhood Obesity Prevention Awards* (Feb. 20, 2012), available at <http://www.deliveringchoices.org/?p=382>.

⁴⁶ See American Beverage Association, *Alliance School Beverage Guidelines Final Progress Report A-1* (Mar. 8, 2010), http://www.ameribev.org/files/240_School%20Beverage%20Guidelines%20Final%20Progress%20Report.pdf.

⁴⁷ *Id.*

drinks to schools and an 88% *reduction* in beverage calories in schools nationwide between the 2004–05 and 2009–10 school years.⁴⁸ Separately, ABA members have voluntarily committed to refraining from marketing sugary drinks in television programs targeting children; this has resulted in a 96% reduction in advertisements for soft drinks between 2004 and 2010.⁴⁹ There is evidence that the industry’s efforts have reduced overall calorie consumption from SSBs, substantially reduced SSB consumption in schools, increased consumer awareness of nutritional decisions, and promoted physical activity and a healthier lifestyle. Moreover, unlike government-mandated regulation, these approaches are tailored to different populations. They treat children differently from adults; they treat residents in food deserts, who may lack healthy options, differently from those who voluntarily choose to consume SSBs over healthier options. They offer consumers additional information to make their choices more informed, while still respecting their right to make choices for themselves. And these approaches offer real solutions in the fight against obesity without infringing personal autonomy or crippling businesses in the process.

⁴⁸ R.F. Wescott, et al., *Industry Self-Regulation to Improve Student Health: Quantifying Changes in Beverage Shipments to Schools*, American Journal of Public Health, Vol. 102, No. 10 at 1932 (October 2012).

⁴⁹ American Beverage Association, *Beverage Industry Responds*, *supra*.

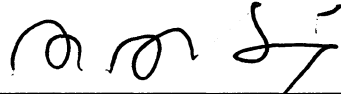
The beverage industry's voluntary and broad efforts to address national obesity trends are just one example of the value of voluntary, industry-led programs and public-private partnerships designed to address complex social problems. In light of the robust industry-led programs and public-private partnerships that are already in place in the obesity area, the Board's failure to directly engage the business community is a major disappointment. The Board ignored New York City's own substantial experience devising creative solutions with public-private partnerships in other areas. Indeed, the Board made no serious effort to engage the business community at all. It opted instead for a coercive top-down approach without adequately considering its limited expected benefits, its substantial costs, and the likely market distortions that it will create. In short, the Board's "go it alone" approach was not simply unlawful, it was also shortsighted and counterproductive.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court permanently enjoining the Board from implementing or enforcing the Portion Cap Rule.

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Respectfully submitted,



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